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ABSTRACT

This paper discusses key issues in fast-tracking the acquisition of school sites in California. Discussion addresses: (1) assembling an experienced team; (2) whether the property owner is a willing or unwilling seller; (3) level of community support or opposition to the site; (4) timing and commencement of California Environmental Quality Act (CEQA) analysis; (5) timing and sequencing of statutory notices and approvals, including approvals by the Department of Education and Department of Toxic Substances Control (DTSC); (6) relocation assistance issues; and (7) vesting of title, prejudgment possession, and eminent domain actions. (EV)

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C.A.S.H. 22nd Annual Conference - A School Facility Space Odyssey

Fast Tracking School Site Acquisition: A Perspective of An Eminent Domain Attorney

By Jerry Behrens
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OVERVIEW

School site acquisitions are the most regulated real property activity under California law. The keys to fast track acquisitions are:

- Assembling an experienced team.
- Whether the property owner is a willing or unwilling seller.
- Level of community support or opposition to site.
- Timing and commencement of CEQA analysis.
- Timing and sequencing of statutory notices and approvals including approvals by the Department of Education and DTSC (State funded projects).
- Relocation assistance issues.
- Vesting of title; pre-judgment possession and eminent domain actions.

A. Assembling an experienced team.

An experienced and well-coordinated team is the key to fast tracking. Lack of coordination and learning curves create unnecessary delays. The team should have the following experience, which could be satisfied in-house depending on the size of the district:

- District Facilities Director/Manager.
- Real Property Negotiator and Strategist.
- Real Estate Appraiser including sub-specialties such as fixture ("FF&E") appraiser, goodwill appraiser if necessary, and relocation specialist.
- Civil Engineer.
- Environmental Consultants for CEQA and DTSC compliance. Note: Although some organizations have both CEQA and DTSC environmental consultants, it is more frequently the case that the CEQA environmental consultant is from an organization that is different from the DTSC consultant. The DTSC consultant is termed an

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"environmental assessor" who, among other duties, supervises the preparation of a Phase I environmental assessment and guides the District, if necessary, through the draft preliminary endangerment assessment and final preliminary endangerment assessment process (the PEA process).

- Legal Counsel specializing in site acquisition work.

B. The property owner: is he a willing or unwilling seller?

If the property owner is willing to give written consent to enter his property for appropriate testing, this is obviously a time saver. If a property owner refuses, school districts must go to court to compel an order. Code of Civil Procedure section 1245.010 et seq. Because of the time delays inherent in court procedures, this could add several months to the process and delay appropriate testing, site surveying and sampling required for DTSC compliance, CEQA compliance, any necessary land surveys and appraisal inspections.

An unwilling seller compels a school district to comply with the eminent domain requirements, which considerably slows the fast tracking process. For condemnation, a resolution of necessity must be adopted by a two-thirds vote. Condemnation cannot occur without certification of appropriate CEQA documents (typically a site specific EIR), DTSC compliance, and a pre-condemnation offer based upon a qualified appraisal. Some property owners deliberately delay the fast track process in a rising market. This is because the date of value cannot be established until a resolution of necessity is adopted, a condemnation action is filed, and the school district places on deposit an amount equal to its appraisal. An unwilling seller may also challenge the condemnation findings made by a district such as the adequacy of the EIR document, the adequacy of the pre-resolution offer, or by challenging the determination that the school site location is for the greatest public good at the least private injury.

A willing seller considerably expedites the process because a consensual purchase agreement may be executed with appropriate conditions for DTSC compliance, EIR compliance, and other pre-conditions to close of escrow. The problem with this process is that a willing property owner may balk at conditions which may extend the close of escrow by many months. The sensitive negotiations in such a case is the level of financial commitment the school district can give in terms of liquidated damages or additional monetary consideration to keep the escrow open and still retain the discretion to consider alternative sites as required by CEQA.

Some real property practitioners have proposed an aggressive position of a purchase agreement, which would result in a close of escrow and transfer of title subject to a right of rescission if the district's conditions are not met. This obviously places a district at risk and must be carefully weighed. At a minimum, such a rescission remedy would require a letter of credit in the event a rescission right is exercised to assure that the property owner still has the money to remit (less liquidated any damages the district pays for its failure to close escrow). This aggressive method may be challenged notwithstanding the fact that CEQA guidelines now allow such purchase agreements to be ratified with conditions.

Under current CEQA Guidelines, public agencies shall not ". . . [f]ormally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities, except that

agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance." 14 CCR 15004(b)(2)A.

A fast track purchase agreement would require the property owner to waive any and all legal objections to acquisition of the site including waiver of CEQA challenges and objections to a district's right to acquire the property. Care must be taken regarding drafting these purchase agreements. Although CEQA does allow such agreements subject to CEQA compliance, certain provisions such as a significant deposit or forfeiture clause could be judicially interpreted that a district failed to preserve its discretion to review for approval alternative sites identified in the EIR as reasonably feasible alternatives. Courts have reversed decisions where they have determined that decisions were effectively made in advance of CEQA compliance which render the EIR process a post hoc rationalization for a pre-determined result.

Preliminary title report disclosures may also indicate that the property owner has significant debt on the property or that there are other significant parties that must concur in the purchase including leasehold interests, easement holders (including railroad easements), and involuntary lienholders such as state and federal tax agencies. Blanket liens securing more than one property require negotiation to secure a lien release in exchange for a percentage payment from the sales price for the property the school district desires to acquire. Clearly, the more parties that must be dealt with and issues resolved within the ambit of a purchase agreement the greater the possibility of slowing down the fast track process.

The process is even more complex if local planning jurisdictions object to the acquisition or impose local zoning ordinances on school construction. School districts may override by a two-thirds vote most local ordinances, including inconsistent municipal plans, provided the override is not arbitrary or capricious.
Consensual property agreement acquisitions are also complicated by multiple sites required for a school site acquisition project. Care must be taken not to create an inverse condemnation situation where some property owners are cooperative and others are not. In such instances, a contract condition must be crafted so that close of escrow is subject to adoption of a resolution of necessity for the entire project including all parcels before individual escrows are closed.

C. Level of community support or opposition to site.

School site acquisition is a highly visible land use decision which may engender considerable community controversy including local agency opposition. Fast tracking requires a considerable amount of communication between the district and its community political leaders before the project coalesces in the selection of a "preferred site" for environmental analysis. The earlier this political dialogue begins, the better. A capital facilities plan may serve as a key not only for coordination with local land use agencies but also in smoothing the way for property acquisition.

Some of the methods by which to ascertain the level of community support or opposition is by appointment of a committee of the Board to identify property sites available for acquisition using state guidelines. Some school districts commission a separate site study either as a part of a community facilities plan or to identify reasonable alternatives before the CEQA process

beings. If begun early in the process, this approach is often effective to smooth the political way to fast track acquisition.

D. Timing and commencement of CEQA analysis.

CEQA analysis can be done at anytime and the sooner the better. Much of the delays in the fast tracking process is an inability to decide on the "preferred site" for EIR analysis. The CEQA process generally lasts from nine to twelve or more months particularly where DTSC compliance is required. Although CEQA does not require a public hearing after the public comment period on a draft EIR, it is highly recommended to notice a public hearing on the certification of the EIR and necessary findings related to school site acquisition. If there is sufficient time in the fast track process, it is prudent to certify the EIR and to file a notice of determination to initiate the 30-day statute of limitations before site acquisition begins.

E. Timing and sequencing of statutory notices and approvals including approvals by the Department of Education and DTSC (State funded projects).

- **Statutory Notices.**

Statutory notices are determined by the location of the site. For example, if the property is within two miles of an airport, a notice must be given to the Department of Education. If the property is within the Williamson Act, notice must be given to the Director of Conservation and the local Williamson Act agency and certain findings must be made. All school site acquisitions require notice to the local planning commission. The school district may notify at any time the local planning commission having jurisdiction to regulate the property under Public Resources Code section 21151.2. Generally it is wise to combine this with another notice found in Government Code section 65402. The planning commission is mandated to give a response within 30 days (40 days for the Government Code). From time to time, such reports from planning commissions are not received or are received late. If the local planning commission disagrees, this simply delays taking title for another 30 days. This notice is apart from the ability of a school district to exempt itself from certain local ordinances by a two-thirds vote.

- **DTSC and Department of Education approval.**

There is no particular time line to secure Department of Education approval but it should be done at the earliest opportunity. The most recent fast track delays have occurred with respect to the oversight of DTSC. The legislature has sought to fast track the DTSC process through AB 2644 (ch. 443, stats. 2000). The key is, at the earliest opportunity, to engage a qualified environmental consultant (defined as an "environmental assessor" under AB 2644) to prepare a Phase I environmental assessment. Under the DTSC triage process, if the Phase I environmental assessment is approved by DTSC after its mandated 30 day review period, DTSC notifies the State Department of Education and the school district that no further action need be taken. If DTSC disagrees and requires the District to conduct a preliminary endangerment assessment (PEA) and the District still wishes to pursue the site, then the PEA must be prepared and presented to the DTSC for approval. The DTSC has 60 calendar days to accept or reject the PEA. The final draft PEA should coincide with the noticing and public availability requirements for the draft EIR so that the DTSC process does not slow down the EIR process.

The earlier the DTSC process is initiated for the preferred site, the less likely DTSC's oversight for state funded projects will cause delay.

F. Relocation assistance issues.

Relocation assistance applies to owners and tenants and is a separate administrative process apart from eminent domain. School districts must adopt their own relocation assistance rules consistent with State law. There must be a relocation plan with rights and remedies spelled out and made available to the parties eligible for relocation assistance. Relocation assistance may be both payment and informational assistance. Failure to timely comply with the relocation assistance law may delay possession of property with a willing seller and delay the District's ability to obtain a pre-judgment possession order in eminent domain proceedings. Although it is typically within the ambit of the purchase agreement negotiation for the seller to waive any relocation assistance, such waivers do not exist and are not forthcoming with respect to tenant relocation assistance, particularly residential tenants. It does little good to have a fast track acquisition plan if relocation benefits are not offered and consummated in a timely matter. A minimum 90 days notice is required to relocate tenants under the relocation law. If tenants refuse to relocate, there will be an additional delay in order to obtain a writ of assistance through the courts.

G. Vesting of title; pre-judgment possession.

Vesting of title as quickly as possible is the objective of the fast track purchase agreement. Since vesting of title does not occur until after judgment in eminent domain proceedings, pre-judgment possession is the primary objective of school districts in a non-consensual owner situation. Pre-judgment possession in condemnation can only be obtained when a deposit equaling the probable amount of compensation for the property is deposited with the court, the court issues a pre-judgment possession order, and the order is served upon the property owners and any tenants. Although possession orders can be effective in as little as three days from service, such three-day possession orders can only be justified on the basis of "urgent need" and therefore should not be relied upon. Farms and businesses require 90 days notice. (Cf. Under the relocation law 90 days notice is also required for tenant relocation.) Otherwise a pre-judgment possession order for vacant property may be obtained within 30 days of service of the pre-judgment possession order. Any fast track time line should assume a 90-day possession order before construction activities commence. Although hardship orders can be obtained to stay pre-judgment possession orders, generally districts can overcome such challenges based upon the cost and delays of construction of much needed school facilities.

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